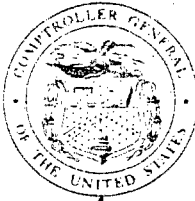


ms. Wilcox PLMT
14789

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

[Request for Waiver of Indebtedness]

FILE: B-198207

DATE: August 22, 1980

MATTER OF: Bernard J. Killeen, Jr. - Waiver of optional life insurance premiums *PD, R*

DIGEST: Where employee elected optional life insurance coverage but appropriate deductions were not made from his pay from 1968 to 1977, the resulting overpayment may not be waived. Since premium deductions should have been reflected on leave and earnings statements, which they were not, employee was on constructive notice of error beginning in 1968 and Standard Forms 50 issued him in 1972 and 1976 indicating optional coverage gave him written notice of the discrepancy. Under these circumstances, it is not inequitable to require payment since employee had benefit of optional life insurance coverage throughout period of overpayment.

We have been asked by Mr. Bernard J. Killeen, Jr. to reconsider the December 14, 1979 determination by our Claims Division denying his request for waiver of an overpayment that resulted from the Social Security Administration's (SSA) failure to make proper deductions from his pay for optional life insurance coverage under the Federal Employees Group Life Insurance Program (FEGLI). Upon review the Claims Division's determination is sustained. *AGC 00026*

The circumstances that gave rise to the overpayment are not in dispute. On February 13, 1968, Mr. Killeen signed a Form SF-176-T ("Election, Declination or Waiver of Life Insurance Coverage") by which he elected optional, in addition to regular, life insurance coverage and authorized payroll deductions to be made for the optional insurance. As a result of administrative error, no payroll deductions were made for optional insurance from 1968 through 1977. Because the optional life insurance nevertheless remained in effect, the failure to deduct premiums resulted in an overpayment to Mr. Killeen of \$1,573.

In requesting that his indebtedness be waived, Mr. Killeen stated that he does not recall his decision to choose optional FEGLI coverage. For this reason and because his leave and earnings statements did not reflect deductions for optional life

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insurance premiums, Mr. Killeen states that from 1968 until 1977 he believed he did not have optional coverage. He claims that this belief led to his decision to increase his coverage under a different life insurance program at a cost in excess of the FEGLI premiums and he adds that at different times over these years he verified with an administrative aide that he did not have optional FEGLI coverage.

The Claims Division found that Mr. Killeen should have known that he had elected optional FEGLI coverage and should have expected corresponding deductions from his pay. Because he failed to note that deductions were not initiated and to take action to resolve the matter, the Claims Division concluded that he was at least partially at fault with respect to the overpayment and denied his request for waiver under 5 U.S.C. § 5584 (1970).

Upon appeal Mr. Killeen points out that the overpayment was caused by an administrative error and not through any misrepresentation or lack of good faith on his part. Moreover, he claims that the premium deductions of \$1,573 are being charged for something he never received. While he recognizes that his wife would have benefited had she become his widow between 1968 and 1977, he notes that the opposite is equally true and suggests that because she did not become his widow no benefit was received. In support of Mr. Killeen's appeal, we have received correspondence from the Acting Associate Commissioner for Management, Budget and Personnel, SSA, asking that consideration be given to the following circumstances that may have led Mr. Killeen to feel he did not have optional insurance coverage:

"* * * In 1969 the HEW Regional Office which handled Mr. Killeen's request for optional FEGLI was in the throes of a relocation from Charlottesville to Philadelphia as well as a reorganization and changes in essential personnel. In addition, the HEW Division of Central Payroll was experiencing operational difficulties at that time. * * *"

The authority for waiver of overpayments of pay and allowances is contained in 5 U.S.C. § 5584 (1970). That section provides that where collection of such a claim would be against equity and good conscience and not in the best interests of the United States, it may be waived by the Comptroller General of the United States unless:

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"* * * in his opinion, there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim * * *." (Emphasis added.)

We consider "fault" to exist if it is determined that the concerned individual should have known that an error existed but failed to take action to have it corrected. See 4 C.F.R. § 91.5 (1980), and 56 Comp. Gen. 943 (1977). If an employee has records which, if reviewed, would indicate an overpayment, and the employee fails to review such documents for accuracy or otherwise fails to take corrective action he is not without fault and waiver will be denied. See Matter of Arthur Weiner, B-184480, May 20, 1976, and Matter of John J. Doyle, B-191295, July 7, 1978.

In Matter of Owen M. Cornell, Jr., B-183249, June 23, 1975, we denied waiver in circumstances where an employee had been overpaid by reason of administrative error in failing to deduct optional life insurance premiums. We there stated:

"We believe that where, as here, an employee (1) elected an employee benefit that was funded out of pay deductions, (2) such employee intended to and, by law, did receive the benefits of his election, (3) the cost of such payment was readily ascertainable when the election was made, and (4) the employee was fully apprised by his earnings statements of the actual amount deducted for payments for the elected benefit within a relatively short period of electing such benefit, then such employee had a duty to find out whether such deductions were properly made and report any discrepancies to the proper authority for rectification."

To the same effect see Matter of Earl G. Smith, B-188948, June 15, 1977, and Matter of Fred P. McCleskey, B-187240, November 11, 1976.

The holding in Matter of Phillip M. Robinson, B-190175, September 27, 1978, involved facts substantially similar to those in Mr. Killeen's case. The employee similarly elected optional FEGLI coverage but the agency failed to make deductions for the

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larger premiums that should have been deducted from his pay beginning with the first pay period after that date. The employee was held to have constructive notice of the Government's error inasmuch as his leave and earnings statements continued to indicate the same premium deductions as had been made previously. Because he failed to make inquiry as to the correctness of his pay or to otherwise take action to rectify the matter, we found that the employee was not without fault and denied his request for waiver.

Like the employee in the Robinson case, we believe Mr. Killeen was on constructive notice of the SSA's failure to make appropriate deductions for FEGLI premiums. Although Mr. Killeen claims that he verified with an administrative aide that he did not have optional FEGLI coverage, the SSA found no evidence that the Regional Personnel Office or the Payroll Division was contacted by Mr. Killeen or on his behalf. Moreover, we are unable to find that problems in the payroll office or the fact that the Regional Office was relocated in 1969 help to establish that Mr. Killeen was somehow justified in believing that the election of optional FEGLI coverage he executed in February of the prior year was not in effect. Appropriate deductions should have commenced in the pay period following his election and because they were not made Mr. Killeen should have been aware of the discrepancy well before 1969.

Two events occurred between 1968 and 1977 that should have further apprised Mr. Killeen of the fact that optional FEGLI premiums should have been but were not deducted from his pay. Incident to his promotion on April 16, 1972, Mr. Killeen was issued a Form 50 which indicated that he had optional as well as regular FEGLI coverage. Assuming that he had theretofore assumed that he was not covered by the optional FEGLI insurance, a proper examination of the Form 50 should have prompted him to inquire at that time. We point out that a Form 50 similarly noting optional coverage was furnished to Mr. Killeen in 1976 in connection with a within-grade step increase. While Mr. Killeen had constructive notice of the error in his pay prior to April of 1972, the Form 50 effecting his promotion provided him with definite written notice of the administrative error in failing to deduct optional FEGLI premium. Matter of Jack A. Shepherd, B-193831, July 20, 1979. In this regard we would stress that every employee has a duty to examine his own personnel and pay records when they are furnished to him and to ascertain whether all of the entries are correct.]

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Concerning Mr. Killeen's suggestion that he received no benefit from the optional FEGLI coverage and should not be obligated to pay for it, we note that his beneficiary would have received the life insurance if he had died during the period after he elected coverage even though no premium payments were deducted from his wages. As in effect presently and throughout the period in question, 5 C.F.R. §§ 871.203 and 871.204 provide that optional insurance can be cancelled only by the employee's ineligibility for coverage or the employee's written cancellation. See Matter of Thomas O. Marshall, Jr., B-190564, April 20, 1978. For this reason, in the Shepherd and Robinson cases cited above, we specifically held that it is not against equity and good conscience to require an employee in Mr. Killeen's situation to pay for the life insurance protection provided. The fact that the contingency upon which the insurance is to be paid did not occur is unpersuasive since Mr. Killeen nevertheless received the same benefit under the optional FEGLI insurance as other employees whose premium payments were properly deducted.

For the reasons set forth above, we hereby sustain the determination by our Claims Division denying Mr. Killeen's request for waiver.

Harry R. Owen

For The Comptroller General
of the United States

Memorandum

August 22, 1980

TO : Associate Director, FGMSD - Claims Group (Room 5858)

FROM : *Harold P. Deane*
Comptroller General
For The

SUBJECT: Bernard J. Killeen, Jr. - Waiver of Optional Life Insurance
Premiums - B-198207-O.M.

Your file Z-2805783 is returned together with a copy of our decision of today which affirms the Claims Group's action denying Mr. Bernard J. Killeen, Jr.'s request for waiver.

Attachments



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-198207

August 22, 1980

The Honorable Nick Rahall II
House of Representatives

Dear Mr. Rahall:

We refer to your interest in Mr. Bernard J. Killeen, Jr.'s request for waiver of an overpayment of \$1,573 that resulted from the Social Security Administration's failure to deduct optional life insurance premiums from his pay for a 9-year period during which he was covered under the optional insurance program.

Having carefully reviewed the record submitted in connection with Mr. Killeen's waiver request and having considered the various arguments posed, we concluded that the circumstances surrounding the overpayment were such that he was on notice of the overpayment and should have taken appropriate steps to rectify the error. For this reason, our decision of today, copy enclosed, affirms the action by our Claims Division denying Mr. Killeen's request for waiver.

We regret that our determination could not be more favorable to your constituent.

Sincerely yours,

Harry R. Van Cleave

For The Comptroller General
of the United States

Enclosure